Supreme Court, U.S.
FILED

JUL 8 - 2010

OFFICE OF THE CLERK

No. 10-73

IN THE

Supreme Court of the United States

JOHN PALERMO AND JULIE PALERMO, PETITIONERS

v.

THE TOWN OF NORTH READING, MASSACHUSETTS,
A BODY POLITIC

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DENNIS P. DERRICK
Counsel of Record

7 Winthrop Street
Essex, MA 01929
(978) 768-6610
dennisderrick@comcast.net

CURRY & TAYLOR ● 202-393-4141

QUESTIONS PRESENTED

1. Should this Court resolve the intercircuit as well as intracircuit conflict of whether in the wake of *Ashcroft v. Iqbal et al.*, 556 U.S. ___ (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544(2007), a heightened pleading standard should be imposed on civil rights plaintiffs alleging municipal liability under *Monell v. New York City Dept. of Social Services*, 436 U.S. 659(1978)?

2. Is a claim for constitutional injury under *Monell* sufficiently alleged when a town in bad faith, for its own profit and for no public purpose, schemes to use its eminent domain power to prevent owners of a buildable subdivision lot from constructing a home there and falsely appraises the lot as unbuildable when making its *pro tanto* offer?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 6

REASONS FOR GRANTING THE PETITION 18

CONCLUSION 28

APPENDIX

Circuit Court Decision 1a
District Court Decision 9a
Amended Complaint 13a

TABLE OF AUTHORITIES

Page

CASES

ASHCROFT V. IQBAL ET AL., 556 U.S.___ (2009).... 17, 18, 20, 21
BELL ATLANTIC CORP. V. TWOMBLY, 550 U.S. 544(2007)..... 17, 18, 20, 21
BISSESSUR V. INDIANA UNIV. BD. OF TRUSTEES, 581 F.3D 599, 603(7TH CIR. 2009)..... 23
BIVENS V. SIX UNKNOWN FED. NARCOTICS AGENTS, 403 U.S. 388(1971)..... 21
CANTON V. HARRIS, 489 U.S. 378, 385(1989)..... 19
CONLEY V. GIBSON, 355 U.S. 41, 45-46(1957).....20, 25
CUEVAS V. CITY OF NEW YORK, 2009 WL 4773033..... 24
DWYER V. CITY OF CORINTH, TEX., 2009 WL 3856989 AT 8-9(E.D. TEX. 11/19/2009..... 23
HAFER V. MELO, 502 U.S. 21, 28(1991)..... 18
HUTCHINSON METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, 685 F. SUPP. 2D 747, 750-751(M.D. TENN. 2010..... 24
JOHN PALERMO AND JULIE PALERMO V. TOWN OF NORTH READING, C.A. NO. 09-1049, 2010 WL 1408815..... 1
JONES V. BOCK, 549 U.S. 199, 212-213(2007)..... 20
LEATHERMAN V. TARRANT COUNTY NARCOTICS INTELLIGENCE & COORDINATION UNIT, 507 U.S. 163, 167-168(1993).....19, 25
MITCHELL V. TOWNSHIP OF PEMBERTON, 2010 WL 2540466..... 23
MONELL V. DEPT. OF SOC. SERVS. OF NEW YORK, 436 U.S. 658, 694(1978).....17, 18
MONROE V. PAPE, 365 U.S. 167, 184(1961)..... 18
NEW YORK CITY DEPT. OF SOCIAL SERVICES, 436 U.S. 659(1978).....18, 19
OWEN V. CITY OF INDEPENDENCE, MISSOURI, 445 U.S. 622, 650-651(1980)..... 18
PEMBAUR V. CITY OF CINCINNATI, 475 U.S. 469, 479(1986)..... 19

SMITH V. DISTRICT OF COLUMBIA, 674 F. SUPP. 2D 209, 211 & N.2(D. D.C. 2009) 23
SPRINGFIELD V. KIBBE, 480 U.S. 257, 267(1987) 19
SWIERKIEWICZ V. SOREMA, N.A., 534 U.S. 506(2002) 20
UNITED STATES V. CLASSIC, 313 U.S. 299, 326(1941) 18
WARD V. NEVADA, 2010 WL 1633461 AT 5(D. NEV. 2/26/2010) 23

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 2
28 U.S.C. § 1343(3) 10
28 U.S.C. § 1343(a)(4) 2
28 U.S.C. § 2101(c) 1
42 U.S.C. § 1983 ..... 15, 17, 18, 25

RULES

Fed. R. Civ. P. 1 3
Fed. R. Civ. P. 8(a)(1) 4
Fed. R. Civ. P. 9(b) 20
Fed. R. Civ. P. 12(b)(6) 4, 13, 20
Fed. R. Civ. P. 15(a)(1) 4
Federal Practice & Procedure Supplemental Service § 1357 22
Supreme Court Rule 13.3 1

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the First Circuit in *John Palermo and Julie Palermo v. Town of North Reading*, C.A. No. 09-1049, 2010 WL 1408815, decided April 9, 2010, affirming the District Court's dismissal of petitioners' amended civil rights complaint against respondent Town of North Reading, is set forth in the Appendix hereto(App. 1-8).

The unpublished decision of the District Court for the District of Massachusetts in *John Palermo and Julie Palermo v. Town of North Reading*, Docket No. 05-11782-RWZ, decided November 14, 2008, dismissing petitioners' amended civil rights complaint against respondent Town of North Reading, is set forth in the Appendix hereto(App. 9-12).

The petitioners' amended civil rights complaint against respondent Town of North Reading, filed in District Court on March 21, 2008, is set forth in the Appendix hereto(App. 13-20).

JURISDICTION

The decision of the United States Court of Appeals for the First Circuit affirming the order of the District Court dismissing petitioners' amended civil rights complaint against respondent Town of North Reading was decided on April 9, 2010; and this petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' decision. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law.....

United States Constitution, Amendment XIV, § 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(a)(4):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ...

> (3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.....

Civil Rights Act–42 U.S.C. § 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Civil Rights Act–42 U.S.C. § 1986:

> Every person who, having knowledge that any of the wrongs conspired to be done..., are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented....

Fed. R. Civ. P. 1:

> [The federal rules of civil procedure] ...shall be construed and administered to secure the just,

speedy, and inexpensive determination of every action and proceeding.

Fed. R. Civ. P. 8(a)(1) & (2):

> **(a) Claims for relief.** A pleading that states a claim for relief must contain:
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief....

Fed. R. Civ. P. 12(b)(6):

> ...[T]he following defenses may at the option of the pleader be made by motion:...(6) failure to state a claim upon which relief can be granted....

Fed. R. Civ. P. 15(a)(1) & (2):

> **(a) Amendments Before Trial.**
> (1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course:
> (A) before being served with a responsive pleading; or
> (B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.
> (2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's

leave. The court should freely give leave when justice so requires.

Mass. Gen. Laws, c. 12, § 11I:

> Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of litigation and reasonable attorney's fees in an amount to be fixed by the court.

Mass. Gen. Laws, c. 79, § 14:

> A person entitled to an award of his damages under this chapter or the body politic or corporate bound to pay the same, whether a petition has or has not been filed or award made under section six, seven, nine or ten, may petition for the assessment of such damages to the superior court of the county in which the property taken or injured was situated....

STATEMENT

In 1927, a subdivision plan containing about 50-75 lots located in respondent Town of North Reading, Massachusetts("respondent"or "the Town"), was recorded in the Registry of Deeds for Middlesex County. The subdivision plan, known as "Holman Half Acres," called for the construction of a series of 20-foot wide access roads all of which would connect the lots to North Street, the closest contiguous street accepted by the Town and part of its roadway system. None of these access roads were built because of the Depression and they became merely "paper streets" with their dimensions and location described only on the recorded subdivision plan.

As time passed, some of these landlocked lots were sold and the Town's Building Inspector issued building permits allowing the landowners to construct homes there as long as the lots were at least one acre, had sufficient frontage on one of the laid out paper streets and the landowners could access their own frontage by way of a meandering, informal gravel road which had gradually developed through the subdivision over time for the landowners' use in accessing their lots.

This gravel road ("the Old Gravel Road") allowed access onto North Street on one side of the subdivision and Magnolia Street on the other side but it did *not* follow the dimensions or the direction of any of the paper streets on the subdivision plan as originally laid out. In fact, the road traversed other lots within the subdivision and was entirely one developed by necessity of those landowners living there. The Old

Gravel Road became the principal means of ingress, egress and travel for every landowner living in the subdivision; and the Town maintained the road by plowing, sanding and other upkeep so that it could accommodate fire and emergency apparatus.

In 1987, petitioners John Palermo and Julie Palermo("petitioners") purchased their 1.2 acre lot located on First Street, one of the paper streets laid out by the original subdivision plan. Like other subdivision landowners before them, petitioners----with the Town's consent--- began in1996 to construct a 20-foot-wide gravel road connecting their lot's frontage on First Street to the Old Gravel Road. Like the Old Gravel Road, petitioners' own gravel road would accommodate emergency apparatus. The Town allowed petitioners' construction and claimed that it—not the landowners---owned the Old Gravel Road, having plowed and maintained it for over 20 years, even placing a street sign on it calling it "First Street."

In 1997, however, some of the other landowners in the subdivision over whose parcel(s) the Old Gravel Road traveled from North Street, brought civil actions in state court against the Town, petitioners and other landowners (*Janet M. Flynn et al. v. Town of North Reading et al.*, Civil Action No. 240309; *David Bornstein et al. v. Town of North Reading et al.*, Civil Action No. 240310) seeking to enjoin the Town as well as other landowners in the subdivision from using the Old Gravel Road running across their property for access to lots within the subdivision. The plaintiffs in these suits wanted to force the Town to move the Old Gravel Road off of their property (so that they would get their land back) and construct the roads as shown

on the 1927 subdivision plan. This litigation caused the Town's building inspector to deny petitioners their building permit application until such time as the private way called First Street was completely constructed so that it was suitable for ingress and egress

These lawsuits challenged the Town's authority to allow the construction of several homes within the subdivision without a constructed roadway system as shown on the recorded plan and then to maintain the Old Gravel Road there which trespassed over some of the landowners' parcels for the convenience of other landowners. If the plaintiffs prevailed, the Town faced the prospect of having to construct the roadway system as it was laid out in the 1927 recorded subdivision plan----at the Town's expense.

The Town had no money for this new construction. Given the lack of funding to install new roads in the subdivision and to prevent a further buildout of the subdivision (including the necessity for some low income housing) while this litigation proceeded, the Town's board of selectmen, Community Planning Commission(CPC), building inspector, Town Administrator and its related departments decided upon a plan in 2000 to take by eminent domain all the land in the subdivision which was not built upon, including petitioners' parcel on First Street. The asserted public purpose for this taking of approximately 50 acres would be passive recreation, i.e., a park. According to this scheme, the Town would claim that the land to be taken was unbuildable and pay the landowners depressed prices based on assessments by its hired appraisers that the parcels were

unbuildable. In fact, the Town knew that each parcel *is and was buildable* as of right subject to a final build-out of the roadway system in accordance with Town standards.

To fund these takings, the Town budgeted $1.7 million and taxed its residents this amount in a special assessment. In addition, it decided to sell conservation land nearby this subdivision to a developer for $1.2 million via "a land swap" which allowed the developer the right to build several single family homes on this land. Accordingly, this "land swap" with the developer involving nearby conservation land provided most, if not all, of the funding for the Town's takings.

In an effort to stop this process and give the Town another option, petitioners in August of 2004 prepared and submitted to the CPC a complete, official subdivision road plan meeting all current requirements and obligating all the landowners in the subdivision---- *not* the Town----to share the cost ($150,000) of constructing the roads consistent with the 1927 subdivision plan. The CPC *ignored* petitioners' submission since notice to all abutters would have been required, adopting petitioners' submission would have proved that the buildable lots were worth about $300,000 each, dramatically increasing the Town's cost of taking any of these parcels by eminent domain.

In January of 2005, the Town began sending out through sealed bids its *pro tanto* checks to landowners in the subdivision for their various parcels, depressed sums based upon its independent assessments that the parcels were unbuildable. The Town awarded petitioners just $15,250 for their lot, a typical award

made to most of the landowners. The Town's eventual cost for taking all the parcels at these depressed prices was $1.2 million, a sum paid for by the "land swap" with the developer, leaving a surplus for the Town's treasury of $500,000.

On July 27, 2005, petitioners brought this civil action against the Town seeking damages which would give them fair market value for their lot(Count I) as well as declaratory relief that the Town's conduct denied them equal protection of the laws and due process(Count II).

In Count III, petitioners alleged that "the actions, decisions, and policies of the [Town] have deprived [them] of all economically beneficial use of the[ir] [lot]" and they sought a declaration that the Town has made an unconstitutional regulatory taking, without paying them just compensation, i.e., by making a patently insufficient *pro tanto* award of just $15,250 for their buildable property, entitling them to damages, attorney's fees and costs. In Count IV, petitioners claimed that the Town's actions in rejecting their plans for developing their parcel was done with a malicious intent to deprive them of their rights under the Massachusetts Civil Rights Act, G.L.c. 12, § 111, for which they sought damages. They claimed a jury trial on all counts of their complaint.

On September 8, 2005, the Town removed the action to the United States District Court for the District of Massachusetts, positing jurisdiction on 28 U.S.C.§ 1331, because of the federal question(s) presented by petitioners' complaint, and on 28 U.S.C. § 1343(3), in view of the claimed deprivation of civil

rights implicated by their allegations. Once in district court, the Town denied all of the material allegations of petitioners' complaint.

The parties agreed to stay this federal action "to allow [petitioners] to pursue their eminent domain claims in state court" so that a jury could determine the damages caused petitioners by the Town's taking under Count I of their complaint. Following a final decision in State court, it was further agreed that the federal district court "will decide whether the state court decision renders this federal court action moot or whether and how this federal court action should proceed as to the civil rights claims."

A jury trial was held in the Middlesex Division of the Superior Court Department on Count I of the petitioners' complaint on February 5-8, 2008(A. 47;80). In its pretrial memorandum, the Town asserted that its appraiser, William LaChance,

> is expected to testify as to the fair market value of the property at the time of the taking.... *Additionally, Mr. LaChance is expected to testify that the subject property is an unbuildable lot.* Moreover, Mr. LaChance is expected to testify that even if the [petitioners] can substantiate their claim that the lot is buildable, there are significant regulatory and physical hurdles that must be overcome in order to obtain a building permit *such that the lot is essentially unbuildable.*

(emphasis supplied).

At trial, however, LaChance testified that *he always considered [petitioners'] lot to be buildable.* In his opinion, the market value of petitioners' property was $280,000.00, assuming that a passable road existed for access to the premises. He fixed the cost of building out First Street in 2008 at $140,000. Petitioners' proof was that the lot was buildable and worth about $325,000. At the conclusion of the trial, the jury awarded petitioners damages for the Town's taking under Count I in the amount of $184,000, together with 2% interest and costs.

Upon return to the federal district court, petitioners amended their complaint to reflect the State court proceedings and refine their allegations(App. 13-20). Their amended complaint attached the same exhibits as their original complaint and restated the material facts but now contained *just two* counts, the first seeking damages for the unconstitutional regulatory taking which deprived petitioners of all economically beneficial uses of their land; the second count sought damages for the Town's bad faith violation of petitioners' federal and state civil rights(App. 18-20).

In support of these claims, petitioners added the further allegations that the Town's CPC, its planning board, was unwilling to allow them to build out First Street according to the rules and regulations for developing unaccepted streets then in force and that such treatment "was absolutely contrary to the treatment given to other property owners in North Reading"(App. 15-16).

In addition, petitioners alleged (in their "Facts" section of the amended complaint) that the Town's

actions "through its obstruction of [petitioners'] attempts to get the lot permitted, and its rejection of its own appraiser (William LaChance's) valuation of the Premises when awarding the *pro tanto* [amount of $15,250.00] to [petitioners], was done in bad faith"(App. 17). Furthermore, they claimed in Count II that the Town's conduct

> in awarding a *pro tanto* to [them] that clearly ignored the appraisal conducted by its own appraiser, and by clearly misreporting the appraiser's expected testimony to the court in its pretrial memorandum in the [State] Superior Court, were malicious acts of bad faith that required [petitioners] to institute an action pursuant to state law to challenge the *pro tanto* award....[and] [s]uch state court challenge resulted in significant legal fees, expert witness fees, lost wages for time spent in court and preparation for court, and financing fees incurred on the delay of receiving a just payment for the property taken by the [Town].

(App. 19-20). Petitioners sought damages, cost and attorney's fees caused by this bad faith conduct by the Town(App. 20).

The Town moved to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim because petitioners having already recovered $184,000.00 from a jury in response to the Town's *pro tanto* award, they "are now attempting to seek additional recourse arising out of the same conduct via a purported "Regulatory Taking" Claim (Count I of the Amended Complaint) and a

"Damages–Bad Faith" claim (Count II of the Amended Complaint)." It argued that the State statutory scheme for rectifying unjust compensation awards was petitioners' exclusive remedy. As for Count II, it contended that petitioners had already received just compensation in the State proceedings and they allege no direct liability of the Town, only *respondeat superior* or vicarious liability, and no allegation of threats, intimidation or coercion for purposes of the State's Civil Rights Act..

In opposition, petitioners claimed that proof of the Town's bad faith conduct emerged in the State court proceedings and showed that the Town through its appraiser LaChance had known well before the taking in 2005 that their property was, in fact, buildable and worth at least $140,000. Yet despite this information from its own appraiser and in violation of the Massachusetts eminent domain statutory scheme, the Town in bad faith made a *pro tanto* award which bore no relationship at all to the known, admitted value of the land taken. In addition, they contended that "trial counsel for the [Town] in the state court action willfully misrepresented the expected testimony of its own trial appraiser, being the same appraiser who made the original appraisal for the [Town] from which the *pro tanto* [award] was calculated."

Specifically, what emerged in the State court proceedings was persuasive proof that in order to avoid building a costly road system for the landowners whom it had allowed to build homes there, the Town devised a plan to take petitioners' unbuilt parcel (as well as other unbuilt parcels in the subdivision) by eminent domain in order to create a passive recreational area and that

pursuant to this plan it (1) refused to allow petitioners to build out the road abutting their parcel thereby preventing its development; (2) made a depressed *pro tanto* award which the Town knew through its own appraiser was false; and (3) misrepresented the expected testimony of its appraiser in the State court proceedings, expecting that petitioners (as well as other affected landowners) would lack the financial resources to challenge these intentionally depressed valuations through court proceedings.

As petitioners concluded, both 42 U.S.C. § 1983, and the Massachusetts Civil Rights Act, G.L.c. 12, § 111, provide relief "when municipalities willfully ignore their obligations to its citizenry for fair and equitable treatment...[as here where] the Town...ignored its obligation...to fairly compensate them for the land taken, thus requiring [petitioners] to expend significant sums [of money], time and effort through litigation to obtain what they should have been awarded at the outset: fair compensation for a buildable lot, taken through eminent domain." They argued that this abuse of power and financial coercion by the Town's board of selectmen, Community Planning Commission(CPC), building inspector, Town Administrator and its related departments beginning in 2000 was compensable bad faith conduct *by the Town itself* under §1983 because it was clear after the State court proceedings that the Town had pursued a policy, practice and plan to subvert any legitimate appraisal of these buildable lots, to deliberately undervalue them as unbuildable lots and for its own profit create depressed *pro tanto* amounts having no relationship to their actual value.

Even counsel for the Town conceded at a Status Conference in July of 2008 in district court that the Town had "made a mistake" when it calculated the value of the land taken for purposes of making *pro tanto* awards to petitioners and other landowners. Petitioners therefore asserted that further discovery and a trial were necessary to determine whether this "mistake" by the Town was authentic for purposes of liability under §1983.

On November 14, 2008, the district court, Zobel, J., allowed the Town's motion to dismiss petitioners' amended complaint(App. 9-12). It determined that petitioners' claim in Count I seeking damages for the unconstitutional regulatory taking had been fully met and neutralized by the jury's award of damages in the State court proceedings(App. 11). As for Count II, the motion judge ruled that the thrust of the claim seeks to hold the Town itself responsible for the actions of certain individuals working for the Town "who denied the requisite permits to develop the site and who ignored the appraiser's opinion to offer a wholly inadequate award"(App. 11-12). Since the Town cannot be vicariously liable under §1983 for the conduct of its employees or representatives and because it is not a person for purposes of the State's Civil Rights Act, there was no liability under Count II (App. 12).

The court of appeals unanimously affirmed the dismissal on April 9, 2010(App. 1-8). It determined that the Town's liability under Count II of the amended complaint was premised solely on the actions of municipal employees and representatives for which the Town itself is not liable under §1983(App. 4-5). While it observed that municipal liability can attach where

"execution of a government's policy or custom...inflicts the injury," (*id.* quoting *Monell v. Dept. of Soc. Servs. of New York*, 436 U.S. 658, 694(1978)), the court of appeals concluded that petitioners "never made such a *Monell* claim until their appeal to this court"(App. 5).

Responding to petitioners' reliance on a paragraph of their amended complaint which sought relief for the "actions, decisions, and policies" of the Town which "deprived [petitioners] of all economically beneficial use of [their property]," the court ruled that this allegation was "not nearly sufficient to support a *Monell* claim because the complaint as a whole contained no factual assertions whatsoever regarding Town policy"(App. 5;7 citing *Ashcroft v. Iqbal et al.*, 556 U.S.___ (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544(2007)). The court thought that the entire premise of petitioners' amended complaint was that petitioners had been treated differently from other property owner, not similarly in accordance with Town policy(App. 7).

REASONS FOR GRANTING THE PETITION

1. There Is Conflict Among The Circuits As Well As *Within* Some Circuits Whether In The Wake Of *Ashcroft v. Iqbal et al.*, 556 U.S. ___ (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544(2007) A Heightened Pleading Standard Should Be Imposed On Civil Rights Plaintiffs Alleging Municipal Liability Under *Monell v. New York City Dept. of Social Services*, 436 U.S. 659(1978).

Congress enacted 42 U.S.C. § 1983, with the central goal of providing protection to those persons wronged by the "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law....'" *Owen v. City of Independence, Missouri*, 445 U.S. 622, 650-651(1980) quoting *Monroe v. Pape*, 365 U.S. 167, 184(1961) and *United States v. Classic*, 313 U.S. 299, 326(1941). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority *or misuse it.*"*Hafer v. Melo*, 502 U.S. 21, 28(1991) quoting *Scheuer v. Rhodes*, 416 U.S. 232, 243(1974) and *Monroe v. Pape*, 365 U.S. at 171-172(emphasis supplied).

When a person injured by a municipality's misconduct seeks to hold the municipality itself liable under § 1983, a majority of this Court in *Monell v. New York City Dept. of Social Services*, 436 U.S. 659, 691-695(1978), held that "a municipality cannot be held

liable solely because it employs a tortfeasor or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691(1978). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. See *Canton v. Harris*, 489 U.S. 378, 385(1989) quoting *Springfield v. Kibbe*, 480 U.S. 257, 267(1987) (O'Connor, J., dissenting).

A plaintiff can plead a *Monell* claim by alleging (a) an express policy that causes a constitutional deprivation when enforced; (b) a widespread practice that is so permanent and well settled that it constitutes a custom or practice; or (c) an allegation that the constitutional injury was caused by a person with final policymaking authority. *Monell*, 436 U.S. at 690-691;694. By pleading one of the above, a plaintiff "distinguish[es] acts of the *municipality* from acts of the *employees* of the municipality, and thereby makes clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479(1986).

Since *Monell*, the Court has refused to impose a heightened pleading standard on plaintiffs alleging a civil rights deprivation by municipalities. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-168(1993), it unanimously rejected a Fifth Circuit rule that a *Monell* plaintiff's complaint state with factual detail and particularity the basis for her claim as incompatible with the liberal system of "notice pleading" exemplified

by Fed. R. Civ. P. 8(a)(2). *Id.* at 168. It explained that "[p]erhaps if [the] Rules...were rewritten today, claims against municipalities under § 1983 might be subjected to added specificity requirements....But that is a result which must be obtained by the process of amending the Federal Rules, and *not by judicial interpretation.*" *Id.*(emphasis supplied).

This same theme of amending the Federal Rules in order to impose a stricter pleading standard was sounded again by the Court in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506(2002) when it unanimously refused to impose on a plaintiff pleading employment discrimination the heightened requirement of showing a *prima facie* case in his complaint. *Id.* at 512. As with suits for municipal liability under § 1983, there is no particularity requirement in Fed. R. Civ. P. 9(b) for employment discrimination suits and none is required absent an amendment of the Federal Rules. *Id.* Finally, in *Jones v. Bock*, 549 U.S. 199, 212-213(2007), the Court unanimously held that prisoners' habeas corpus petitions need not allege or demonstrate exhaustion of administrative remedies in their complaints since under the Federal Rules this issue is to be raised by the defendant as an affirmative defense. *Id.*

With the law in this posture, the Court decided *Ashcroft v. Iqbal et al.*, 556 U.S.___; 129 S. Ct. 1937, 1949(2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544(2007). Absent any amendment of the Federal Rules, the Court revised the standards of *Conley v. Gibson*, 355 U.S. 41, 45-46(1957) for dismissing a complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. To survive such a motion now, the complaint's *factual*—

not legal---allegations are taken as true; and if the complaint so read contains sufficient factual matter to state a claim for relief that is plausible on its face, allowing the court to draw the reasonable inference that the defendant may be liable for the misconduct alleged, dismissal is not warranted. *Iqbal*, 556 U.S. at ___;129 S. Ct. at 1949. *Twombly*, 550 U.S. at 570.

The complaint's factual allegations must be enough to raise the right to relief above the speculative level, assuming that all the allegations of the complaint are true, even if doubtful in fact. *Twombly*, 550 U.S. at 555. This new standard "calls for enough fact to raise a reasonable inference that discovery will reveal evidence of" the defendant's unlawful conduct, or enough factual heft to show that the pleader is entitled to relief. *Id.* at 556. This evaluation will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at ___; 129 S. Ct. at 1950.

In *Twombly*, the sufficiency of the plaintiff's complaint was addressed within the context of complex antitrust litigation, prompting an analysis fueled by the consideration that the defendant should not be put to the cost of protracted, costly discovery unless the complaint alleged enough facts to show that the claims had merit. *Iqbal's* plaintiff sought relief under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388(1971), providing an implied private cause of action against federal officers who had allegedly violated his constitutional rights. *Iqbal*, 556 U.S. at ___; 129 S. Ct. at 1947-1948. However, the analysis of the complaint's sufficiency was informed by the fact that even "minimally intrusive discovery" might deter or detract

the high-level government defendants there "from the vigorous performance of their [national security] duties." *Id.* at ___; 129 S. Ct. at 1953-1954.

The Court's *Twombly-Iqbal* analysis and its effect on the Federal Rules' ethic of notice pleading as exemplified by Rule 8 have created as many questions as answers. Neither decision has convinced Congress or scholars that notice pleading which has characterized the Federal Rules since their inception survives these decisions. See, e.g., Wright & Miller, § 1216; West Group, *Federal Practice & Procedure* Supplemental Service § 1357, referencing The Notice Pleading Restoration Act of 2009, S. 1504(introduced in the Senate to reinstate pre-*Twombly* standards for a motion to dismiss); H.R. 4115, Open Access To Courts Act of 2009, § 2 (Notice Pleading Restoration); Testimony of Arthur R. Miller before the Subcommittee of the Constitution, Civil Rights and Civil Liberties, Oct. 27, 2009, Serial No. 111-36 at 6-30, available at http://judiciary.house.gov/ hearings/ hear 091027 1.html; Jay S. Goodman, *Two New U.S. Supreme Court Cases Raise the Question: Is Notice Pleading Dead?*, 58 Fed. R.I. B.J. 5(2010); Hon. John P. Sullivan, *Twombly and Iqbal: The Latest Retreat From Notice Pleading*, 43 Suffolk U. Law Rev. 1, 47-61(2009).

Moreover, there is considerable uncertainty among the inferior federal courts about the precise dimensions of these decisions, given that (a) the author of *Twombly's* majority analysis, Justice Souter, dissented in *Iqbal* about the way the standards he framed in *Twombly* were applied; (b) *Twombly's* language endowing every reviewing court with the right to draw upon on its own "judicial experience and

common sense" in assessing whether the plaintiff's alleged facts have the ring of plausibility or are merely "conclusory" is open-ended; (c) both decisions were instigated in part by a dearth of facts in the complaints which could justify the costly, time-consuming discovery for defendants in complex litigation or ones distracted by national security; (d) both seem to reject the long held proposition under the Federal Rules that all inferences are to be drawn in favor of the pleader; and (e) both accomplish an amendment of Rule 8 by judicial interpretation, contrary to the Court's earlier unanimous pronouncements in *Leatherman*, *Swierkiewicz* and *Jones* that it would not do so.

Reflecting this uncertainty, the circuits are in conflict about whether in the wake of these decisions a heightened pleading standard should apply to civil rights plaintiffs alleging municipal liability under *Monell*. The First Circuit (in this case), the Third Circuit (*Mitchell v. Township of Pemberton*, 2010 WL 2540466 at 6(D.N.J. 6/17/2010)), the District of Columbia Circuit (*Smith v. District of Columbia*, 674 F. Supp. 2d 209, 211 & n.2(D. D.C. 2009)) and the Ninth Circuit (*Ward v. Nevada*, 2010 WL 1633461 at 5(D. Nev. 2/26/2010)) have all ruled that the *Twombly-Iqbal* standard applies in assessing these complaints.

However, courts in the Fifth and Seventh circuits have refused to apply the *Twombly-Iqbal* standard, noting that *Leatherman* and its progeny provide the better approach for measuring a civil rights complaint alleging municipal liability. See *Dwyer v. City of Corinth, Tex.*, 2009 WL 3856989 at 8-9(E.D. Tex. 11/19/2009); *Bissessur v. Indiana Univ. Bd. of Trustees*, 581 F.3d 599, 603(7th Cir. 2009)("Our system operates

on a notice pleading standard; *Twombly* and its progeny do not change this fact."); *Wiek v. Keane*, 2010 U.S. Dist. LEXIS 47884 at 3-4(N.D. Ill. 2010); *Miller v. City of Plymouth*, 2010 U.S. Dist. LEXIS 35686 at 4(N.D. Ind. 2010). See also *Smith v. Duffey*, 576 F.3rd 336, 339-340(7th Cir. 2009)(Posner, J.)("maybe" *Twombly* and *Iqbal* should be held to their own facts and the particular discovery issues they confronted).

The courts in two other circuits (the Second and Sixth) have issued decisions pointing in *both* directions. Compare *Colon v. City of New York*, 2009 U.S. Dist. LEXIS 110520 at 2(E.D.N.Y. 2009)(Weinstein, Jack B., J.)(finding sufficient issues of fact under *Monell* and noting that '[n]either *Twombly* nor *Iqbal* can trump the Constitution.") with *Cuevas v. City of New York*, 2009 WL 4773033 at 3-4(S.D.N.Y. 2009)(applying *Twombly* and *Iqbal*); compare *Hutchinson Metropolitan Government of Nashville and Davidson County*, 685 F. Supp. 2d 747, 750-751(M.D. Tenn. 2010)(following *Iqbal* reluctantly) with *Lott v. Swift Transp. Co., Inc.*, 2010 U.S. Dist. LEXIS 25654 at 5(W.D. Tenn. 3/17/2010)(following *Leatherman*).

The Court should resolve this blossoming disarray in the inferior federal courts, redefine with bright lines the contours of *Twombly* and *Iqbal*, and set forth the proper standard which should be applied to complaints brought by civil rights plaintiffs alleging municipal liability.

2. A Claim For Constitutional Injury Under *Monell* Is Sufficiently Alleged When A Town In Bad Faith, For Its Own Profit And For No Public Purpose, Schemes To Use Its Eminent Domain Power To Prevent Owners Of A Buildable Subdivision Lot From Constructing A Home There And Then Falsely Appraises The Lot As Unbuildable When Making Its *pro tanto* Offer.

Under *Leatherman*, *Swierkiewicz* and *Jones*, petitioners are not held to a heightened pleading requirement nor are they required to plead specific facts to prove the existence of a municipal policy. Conclusory allegations of a policy or practice can support such a claim where petitioners allege enough facts to give the municipality fair notice of the claim because under the notice pleading regime of the Federal Rules, a defendant is owed "fair notice of what the...claim is and the ground on which it rests." *Conley v. Gibson*, 355 U.S. at 47. Petitioners need not set forth all the details of their case against a municipality under § 1983 at the pleading stage, *Leatherman*, 507 U.S. at 168; even "boilerplate" allegations of an offensive municipal policy are generally sufficient; and petitioners' factual allegations must be presumed to be true and should be liberally construed in their favor. *Id.* at 164; *Scheuer v. Rhodes*, 416 U.S. at 236.

When read in the light most favorable to petitioners and with every fact recited therein assumed as true for the purposes of a motion to dismiss, the facts alleged in Count II of petitioners' amended complaint state a viable claim against the Town for compensation under 42 U.S.C. § 1983. They allege that the Town itself for its own profit and for no public purpose

implemented a coherent policy of taking by eminent domain unimproved parcels in a subdivision which was not going to be completed, making unfairly low *pro tanto* awards based on its false claim that these lots were unbuidlable, in order to force landowners like petitioners to accept unfairly low payments for their property or face protracted litigation in order to achieve compensation.

Specifically, what emerged in the State court proceedings----as reflected by the facts recited in petitioners' amended complaint---was proof that in order to avoid building a costly road system for the landowners whom it had allowed to build homes in an undeveloped subdivision, the Town devised a plan to take petitioners' unbuilt parcel (as well as other unbuilt parcels in the subdivision) by eminent domain and pursuant to this plan it (1) refused to allow petitioners to build out the road abutting their parcel thereby preventing its development; (2) made a depressed *pro tanto* award which the Town knew was false; and (3) misrepresented the expected testimony of its appraiser in the State court proceedings, expecting that petitioners (as well as other affected landowners) would lack the financial resources to challenge these intentionally depressed valuations through court proceedings.

For its own profit, for no public purpose and in order to escape liability in the pending lawsuits brought against it by Flynn et al., seeking to have a roadway system built for this undeveloped subdivision, the Town lied about these lots being unbuildable and then offered *pro tanto* award based on its false claim that they were not buildable, leaving petitioners and

other affected landowners with the burden of paying attorney's fees and court costs in order to expose the Town's fraud. *This* is the constitutional injury above and beyond the taking itself (for which petitioners received compensation in State court) which deserves redress under § 1983 and Count II of petitioners' amended complaint.

The Town's unlawful scheme could not be carried out *in vacuo*; and petitioners' amended complaint justifiably identifies those actors who took part in devising this policy of financial coercion and abuse of power, i.e., the Town's board of selectmen, its Community Planning Commission(CPC), its building inspector, the Town's appraiser, Town Administrator and its related departments as well as the Town's attorneys. As described by petitioners' allegations, the Town is *not* vicariously liable; the *Town itself* devised this coherent, concerted policy in bad faith for no public purpose in order to profit from the predicament it had created when it allowed landowners to build on parcels located in an undeveloped subdivision, permitting them to use the Old Gravel Road for access, a road th Town claimed as its own.

In addition, as petitioners' allegations of fact make clear, *the Town itself* is the "moving force" behind this coherent municipal policy or practice of confecting false appraisals for its own profit and forcing its citizenry including petitioners into costly, time-consuming litigation in order to vindicate their right to just compensation. The Town's conduct is an abuse of power and an exercise of financial coercion which § 1983 is designed to remedy with an award of damages. Count II of petitioners' amended complaint fairly alleges this

compensable constitutional injury against the Town and it should not have been dismissed.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit and to vacate and reverse the judgment and remand the matter to the United States District Court for the District of Massachusetts with instructions that petitioners' claims under Count II of their amended complaint against the Town for violation of their civil rights be reinstated, that discovery ensue on this claim and that a jury trial be had; or provide petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

DENNIS P. DERRICK
Counsel of Record

7 Winthrop Street
Essex, MA 01929
(978) 768-6610
dennisderrick@comcast.net

(any footnotes trail end of each document)

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

No. 09-1049
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOHN PALERMO; JULIE PALERMO,
Plaintiffs, Appellants,

v.

TOWN OF NORTH READING,
Defendant, Appellee.

April 9, 2010, Decided

APPEAL FROM THE UNITED STATES DISTRICT COURT. FOR THE DISTRICT OF MASSACHUSETTS. Hon. Rya W. Zobel, U.S. District Judge.

COUNSEL: Mark J. Favaloro, with whom Favaloro & Associates was on brief, for appellants.

Judy A. Levenson, with whom Deidre Brennan Regan and Brody, Hardoon, Perkins & Kesten, LLP, were on brief, for appellee.

Before Boudin, Stahl, and Lipez, Circuit Judges.

OPINION

STAHL, *Circuit Judge.* Plaintiffs-appellants John and Judy Palermo ("the Palermos") brought an amended complaint against the Town of North Reading ("the Town") alleging an unconstitutional taking of property and violation of their civil rights as protected by 42 U.S.C. § 1983 and the Massachusetts Civil Rights Act. The district court dismissed the complaint in its entirety for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The Palermos only appeal the dismissal of their federal civil rights claim brought pursuant to § 1983. After careful consideration we affirm.

In 1987, the Palermos purchased three lots of land in North Reading, Massachusetts, and thereafter, in 1997, sought a building permit for those lots. The Town's building inspector denied the permit, requiring that construction of the street upon which the lots were located be completed first. The Palermos alleged that from 1997 to 2005, the Town allowed other property owners to develop similar lots on unaccepted streets[1] while denying them the same ability. In 2004, the Palermos petitioned the Town's Community Planning Commission to build out the adjacent street as an unaccepted street. The Town's Planner denied that request, indicating that "a complete subdivision plan would be necessary." The Palermos alleged that this treatment was contrary to the treatment received by other property owners in the Town. In 2005, the Palermos learned that the Town's Board of Selectman had voted to take their land by eminent domain and that they would be given a *pro tanto* award of $ 15,250,

an amount that the Palermos believed was significantly lower than the market value of the land.

The Palermos filed suit in state court seeking, among other things, just compensation for the Town's eminent domain taking pursuant to Massachusetts General Law ch. 79. The Town removed the action to federal court and the parties subsequently filed a joint motion to stay the federal action and allow the Palermos to pursue their state law eminent domain claim in state court. In the state court proceeding, the Town filed a pretrial motion stating that it expected its appraiser to testify that the Palermos' property was either unbuildable or effectively unbuildable due to significant regulatory and physical hurdles that would have to be overcome in order to obtain a building permit on the property. However, at trial, the appraiser testified that the property was buildable and that the market value was $ 140,000. The jury returned a verdict in favor of the Palermos for $ 184,000.

Following the favorable state jury verdict, the Palermos returned to federal court and filed a motion to reopen their federal action. The district court was uncertain as to what, if anything, remained of the case following the jury verdict, and ordered the Palermos to file an amended complaint. The Palermos' amended complaint asserted two counts against the Town: (1) violation of the Fifth Amendment of the U.S. Constitution and Articles X and XII of the Massachusetts Constitution due to an unconstitutional taking of the Palermos' property; and (2) "bad faith" by the Town, which allegedly violated the Palermos' civil rights as protected by 42 U.S.C. § 1983 and the Massachusetts Civil Rights Act. Count Two's "bad

faith" charge was based on the Town's denial of the building permit and its offer of a "de minimis" *pro tanto* award in spite of the appraiser's significantly higher valuation.

Count Two did not state which of the Palermos' civil rights the Town was alleged to have violated. In addition, Count Two only referred to acts committed by agents and employees of the Town, rather than acts committed by the Town itself. Finally, Count Two contained no allegation that the alleged civil rights violations were the result of a policy, practice, or custom of the Town.

In response to the amended complaint, the Town filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). As to the federal civil rights claim in Count Two, which is the only part of the amended complaint before us on appeal, the Town urged the district court to dismiss on the ground that municipal liability for civil rights claims can only rest on actions committed by the municipality itself, not on respondeat superior or vicarious liability for acts committed by employees of the Town. *See Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 694-95, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Agreeing with the Town that the Palermos had only alleged wrong-doing by "the individuals who denied the requisite permits to develop the site and who ignored the appraiser's opinion to offer a wholly inadequate award," rather than wrong-doing by the Town itself, the district court dismissed Count Two in its entirety.[2]

On appeal to this court, the Palermos argue that the motion to dismiss as to Count Two's federal civil rights

claim was improperly granted because the Town was the "moving force" behind a "policy, practice, or custom" of "tak[ing] certain property of its inhabitants by eminent domain through the use of an unlawful process."[3]

Having conducted a de novo review, *TAG/ICIB Servs., Inc. v. Pan Am. Grain Co., Inc.*, 215 F.3d 172, 175 (1st Cir. 2000), we reject the Palermos' arguments on appeal. The district court was correct to conclude that where municipal civil rights liability under § 1983 is premised solely on the actions of municipal employees or representatives, as was the case in the Palermos' amended complaint, liability does not attach. *See Monell*, 436 U.S. at 694 ("We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents.").

While it true, as the Palermos argue on appeal, that municipal liability can attach where "execution of a government's policy or custom . . . inflicts the injury," *id.; see also Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989), the Palermos never made such a *Monell* claim until their appeal to this court. The Palermos did not mention the Town's policy, practice, or custom in their amended complaint, opposition to defendant's motion to dismiss, or anywhere else.[4] "It is a bedrock rule that when a party has not presented an argument to the district court, she may not unveil it in the court of appeals." *United States v. Slade*, 980 F.2d 27, 30 (1st Cir. 1992). We decline the Palermos' request to read their amended complaint so as to discover a claim that they simply did not make.[5]

We therefore *affirm* the district court's dismissal of the Palermos' federal civil rights claim against the Town.

Footnotes

1 An unaccepted street is a public right of way that has not been built to municipal standards.

2 The district court put forth a second ground for dismissal of Count Two, that the Palermos failed to identify the constitutional right(s) that they alleged were violated by the Town. "[T]he complaint is unclear, at best, as to which of their constitutional rights were violated and what specific conduct of the Town deprived plaintiffs of those rights." *Palermo v. Town of North Reading*, No. 05-11782-RWZ (D. Mass. Nov. 14, 2008) (order granting motion to dismiss).

In addition, though not relevant to this appeal, we note that the district court dismissed Count One because, "To the extent the plaintiffs continue to complain about the inadequate *pro tanto* award, their procedural due process rights have been fully vindicated by the jury trial in which they were heard and the jury clearly heard them." *Id.* The district court also noted that "[I]t is difficult . . . to discern the basis for the claim that the taking was unconstitutional and second, to reconcile that claim with plaintiffs' acceptance of the award." *Id.* The Palermos did not appeal from the dismissal of Count One.

3 The Palermos also argue, in response to the district court's second ground for granting the motion to dismiss on the civil rights claim, that the constitutional

right violated by the Town was the right to substantive due process.

4 Indeed, the amended complaint is premised on the notion that the Palermos were treated *differently* than other property owners in the Town, rather than the same as many other property owners as part of the Town's policy, practice, or custom. The Palermos asserted at oral argument that Paragraph 26 of the amended complaint raised a sufficient *Monell* claim for purposes of a motion to dismiss. That paragraph alleged that "the actions, decisions, and policies" of the Town "deprived the Plaintiffs of all economically beneficial use of the Premises." Under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), this allegation is not nearly sufficient to support a *Monell* claim because the complaint as a whole contained no factual assertions whatsoever regarding Town policy. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting *Twombly*, 550 U.S. at 570). As noted above, the factual premise of the amended complaint was that the Palermos had been treated differently from other property owners, not similarly in accordance with Town policy.

5 In addition, the Palermos make a brief argument that the federal constitutional injury they suffered was the violation of their right to substantive due process. This alleged injury was not included in their amended complaint and we will not consider it here for the first time. *Slade*, 980 F.2d at 30. We agree with the district court that the Palermos failed to specify the

constitutional right upon which their § 1983 claim was premised.

CIVIL ACTION NO. 05-11782-RWZ
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN PALERMO and JULIE PALERMO

v.

TOWN OF NORTH READING ORDER

November 14, 2008

ZOBEL, D.J.

Plaintiffs, John and Julie Palermo, allege that they acquired three lots of land in the Town of North Reading, Massachusetts in 1987 and that they sought a building permit in 1997 which the building inspector denied pending construction of the street on which the lots are located. They further claim that thereafter defendant Town "has allowed other property owners to develop similar properties to the Premises, yet the Town had denied the Palermos the right to develop their property." (Complaint (Docket # 1-2) Par. 11.) In 2003 they were informed that the Town planned to take their land by eminent domain, and on March 24, 2005, they were notified that the Board of Selectmen had voted to take their land "for open space purposes." (Docket # 1-3, 12.) The Town offered $15,250 for the taking. Plaintiffs asserted throughout that their land was a buildable lot and, after the taking, that the pro tanto award was well below the fair market value. They filed a complaint in the state court with four counts. Count I is under the Massachusetts eminent domain statute, Mass. Gen. Laws ch. 79, for a determination of

the fair market value of the property. Count II seeks a declaratory judgment under the state statute, Mass. Gen. Laws ch. 231A, that plaintiffs were entitled to a building permit. This count is further embroidered with references to the Equal Protection and Due Process Clauses of the United States and Massachusetts Constitutions. Count III asserts that the taking was unconstitutional again under both the federal and state constitutions as having no "substantial relationship to public health, safety or welfare." (Complaint Par. 28.) Count IV claims violations of the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12. Given the several federal constitutional claims, defendant removed the action to this court.

After considerable skirmishing, this court remanded to the state court the eminent domain proceeding and stayed the remaining counts pending resolution of that claim. The former was tried to a jury which returned an award of $184,000. When the case came back to this court, plaintiffs insisted on prosecuting their remaining claims. Because the court was unclear what remained of the case after the jury's verdict, it ordered plaintiffs to file an amended complaint clearly setting forth their claims. The amended complaint is in two counts. Count I invokes the Fifth Amendment to the United States Constitution and Articles X and XII of the Massachusetts Constitution and asserts an unconstitutional taking. Count II complains about the "bad faith" denial of the building permit and the improper pro tanto award which caused plaintiffs to incur "significant legal fees, expert witness fees, lost wages for time spent in court and in preparation for court, and financing fees [as a result of] the delay of receiving a just payment for the property taken. . . ."

(Amended Complaint (Docket # 17) Par. 35.) It is based on alleged violations of the State and Federal Civil Rights Acts, Mass Gen. Laws ch. 12, § 11 I and 42 U.S.C. § 1983. Defendant has moved to dismiss the amended complaint under Federal Rules of Civil Procedure 12(b)(6) and (h)(3) for failure to state a claim and lack of subject matter jurisdiction. The motion is allowed.

As to Count I, it is difficult first to discern the basis for the claim that the taking was unconstitutional and second, to reconcile that claim with plaintiffs' acceptance of the award. In any event, the Fifth Amendment to the United States Constitution and Article X of the Massachusetts Constitution do not prohibit the taking of private property; they only prohibit such taking without just compensation.fn1 To the extent plaintiffs continue to complain about the inadequate pro tanto award, their procedural due process rights have been fully vindicated by the jury trial in which they were heard and the jury clearly heard them.

As to Count II, plaintiffs' complaints are directed at the North Reading Building Inspector for denying a building permit (Amended Complaint Par. 8), the Town "through its Town Planner," the Community Planning Commission and the Town's Planning Board (id. Par. 14) for not permitting plaintiffs to develop their lot, and the Town for ultimately taking their land and offering an amount known to be artificially low and contrary to an appraisal initiated by them. The only named defendant is the Town but the conduct of which plaintiffs complain is not the conduct of the Town, but that of the individuals who denied the requisite permits

to develop the site and who ignored the appraiser's opinion to offer a wholly inadequate award. The Town cannot be held vicariously liable under the federal statute for the conduct of its employees or representatives. Monell v. New York City Dept of Soc. Servs., 436 U.S. 658, 694-95 (1978). In addition, the complaint is unclear, at best, as to which of their constitutional rights were violated and what specific conduct of the Town deprived plaintiffs of those rights. Plaintiffs' state claim similarly fails as "a municipality is not a `person' covered by the Massachusetts Civil Rights Act. . . ." Howcroft v. City of Peabody, 51 Mass. App. Ct. 573, 591-92, 747 N.E.2d 729 (2001).

Accordingly, defendant's motion to dismiss (Docket # 21) is ALLOWED.

November 14, 2008

RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

Footnote

fn1Article XII provides protections similar to those in the Fifth Amendment but in the context of criminal prosecutions. It has nothing to do with this dispute.

C.A. No. 05-11782 RWZ
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN PALERMO AND JULIE PALERMO,
Plaintiffs

v.

TOWN OF NORTH READING, a body politic,
Defendant.

AMENDED COMPLAINT

I. Parties

1. Plaintiff John Palermo is an individual residing at 8 Hillside Road, Boxford, Massachusetts.

2. Plaintiff Julie Palermo is an individual residing at 8 Hillside Road, Boxford, Massachusetts

3. The Defendant, Town of North Reading, is a body politic with a usual place of business at 235 North Street, North Reading, Massachusetts.

II. Facts

4. On June 30, 1987, Plaintiffs John Palermo and Julie Palermo (collectively "Palermos") acquired the premises known as Lots 70, 71, and 86 First Street, North Reading, Massachusetts, as further described in a deed rendered with the Middlesex South District Registry of Deeds in Book 18278, Page 170 (Premises). The Premises abut a private way in North Reading

known as First Street.

5. On or about August 11, 1997, the Palermos made application to the North Reading Board of Health seeking a disposal work permit for a septic system to be built on the Premises. A copy of correspondence dated August 28, 1997 from Martin Fair, the Health Agent of the Defendant, is attached to Plaintiffs' complaint as Exhibit 1.

6. Said permit was sought in connection with a building permit application by the Palermos for the Premises, also filed in August of 1997.

7. On August 28, 1997, The Palermos obtained approval for a percolation test for the Premises which appraisal was required for the septic permit and ultimately the building permit sought by the Plaintiffs.

8. Plaintiffs' building permit was denied by the North Reading Building Inspector until such time that First Street was completely constructed.

9. Immediately thereafter, litigation was commenced by an abutter to Palermos' property, William Flynn, seeking to enjoin the Palermos and others from using an "old gravel way" crossing his property, located outside the limits of First Street, which way had been used by the Palermos and others to access their property. Flynn also brought an action against the Town of North Reading and its Building Inspector alleging that the Town had breached its duty relative to First Street and the old gravel way. Said lawsuit effectively prevented the Plaintiffs from proceeding with the plans to develop the premises until

said suit was resolved.

10. From 1997 to date, the Defendant has allowed other property owners to develop similar properties to the Premises, yet the Defendant that time had denied the Palermos the right to develop their property.

11. In the summer of 2003, the Palermos were contacted by an appraiser, William LaChance (LaChance) on behalf of the Defendant indicating that the Town was planning to take Palermos' land by eminent domain.

12. In response to the same, the Palermos caused correspondence to be sent to such appraiser, confirming that the premises were in fact a buildable lot. A copy of such correspondence is attached to Plaintiffs' original complaint as Exhibit 2.

13. In 2004, the Palermos again petitioned the Defendant, through its Community Planning Commission (CPC), to build out First Street as an unaccepted street. A copy of such application is attached to Plaintiffs' original complaint as Exhibit 3.

14. The Defendant, though its Town Planner, Robert Rodgers, (Rodgers) informed Plaintiffs' counsel that the CPC, the Town's Planning Board, was not willing to allow the Plaintiffs to build out First Street according to the rules and regulations for the development of unaccepted streets then in force, and that a complete subdivision plan submission would now be necessary.

15. Such direction by Rodgers was absolutely

contrary to the treatment given to other property owners in North Reading.

16. On March 24, 2005, despite the existence of the aforesaid Flynn lawsuit, the Town took Plaintiffs' property by eminent domain. A copy of a notice evidencing such taking is attached to Plaintiffs' original complaint as Exhibit 4.

17. The pro tanto award given to the Palermos was $15,250.00.

18. On February 5 -8, 2008, A jury trial was held in the Middlesex (MA) Superior Court to try the issue of the eminent domain taking, which claim was set forth in Count I in Plaintiffs' originally field complaint.

19. In connection with said trial, the Defendant, in its pretrial memorandum filed with the Superior Court, asserted that:

> "Mr. LaChance [its appraiser] is expected to testify as the fair market value of the property at the time of taking...
>
> **Additionally, Mr. LaChance is expected to testify that the subject is an unbuildable lot.** Moreover, Mr. LaChance is expected to testify that even if the plaintiffs can substantiate their claim that the lot is buildable there are significant regulatory and physical hurdles that must be overcome in order to obtain a building permit **such that the lot is essentially unbuildable**. (emphasis supplied)"

20. At said trial, LaChance testified inter alia that:

- He was the appraiser hired by the Defendant in connection with the taking of Plaintiffs' land, and that he always considered the lot in question buildable;

- He considered that market value of the lot to be $280,000, assuming a passable road existed for access to the premises;

- Although he didn't have any calculations available to him when he appraised the lot in 2003, he at the time of trial in 2008 thought that the road costs were $140, 000; and

- As set forth in his appraisal submitted at trail as an exhibit, he concluded the value of the lot in question therefore to be $140,000.

21. At the conclusion of trial, the jury awarded damages to the Palermos (pursuant to Count I only of the original complaint) in the amount of $184, 000 plus interest and costs.

22. The actions of the Defendant, through its obstruction of Palermos' attempts to get the lot permitted, and its rejection of its own appraisers valuation of the premises when awarding the pro tanto to the Plaintiffs, was done in bad faith.

23. The pro tanto amount awarded to the Plaintiffs did not represent the fair market value of the property

before the taking.

24. As a result, the Palermos have been damaged. Count I (Regulatory Taking) (U.S. Const., 5th Amend) (Mass. Const., Art. X and XII)

25. The Plaintiffs restate and re-allege each other allegation of the Complaint as if set forth at length herein.

26. As set forth above, the actions, decisions, and policies of the Defendant had previously deprived the Plaintiffs of all economically beneficial use of the Premises.

27. The said actions, decisions, and policies of the Defendant do not have a substantial relationship to public health, safety or welfare.

28. Palermo's' proposed development of the Premise would not have created a nuisance or violation of state property laws.

A. Enter Judgment declaring that the Defendant have effected an unconstitutional taking of the Plaintiffs' Premises:

B. Award the Plaintiffs damages in an amount to be determined at trial;

C. Award the Plaintiffs interest, costs, and attorneys' fees; and

D. Grant the Plaintiffs such other and further relief as is just and appropriate.

COUNT II (Damages- Bad Faith) (Massachusetts Civil Rights Act M.G.L. ch. 12 §11I (Federal Civil Rights Act 42 USC 1983)

29. The Plaintiff restates and re-alleges each other allegation of this Complaint as if set forth at length herein.

30. The actions of the Defendant in rejecting the Palermos' plans were made in bad faith.

31. The actions of the Defendant knowing that all or substantially all other similarly situated properties previously considered by the CPC had been approved, was an act of bad faith.

32. The actions of the Defendant and CPC and its agents maliciously and intentionally deprived Plaintiffs of the protections afforded by Massachusetts and Federal law and deprived them of their civil rights.

33. The actions of Defendant's agents were not done within the scope of their official authority as Members of the Board.

34. The actions of the Defendant, in awarding a pro tanto to the Plaintiffs that clearly ignored the appraisal conducted by its own appraiser, and by clearly misreporting the appraiser's expected testimony to the court in its pretrial memorandum in the Superior Court, were malicious acts of bad faith that required the Plaintiffs to institute an action pursuant to state law to challenge the pro tanto award.

35. Such state court challenge resulted in significant

legal fees, expert witness fees, lost wages for time spent in court and in preparation for court, and financing fees incurred on the delay of receiving a just payment for the property taken by the Defendant.

WHEREFORE, the Plaintiffs pray that this Court:

A. Enter Judgment in favor of the Plaintiffs;

B. Award the Plaintiffs damages against the Defendant in an amount to be determined at trial;

C. Award the Plaintiffs interest, costs and attorneys' fees; and

D. Grant the Plaintiffs such other and further relief as is just and appropriate, including punitive damages.

Jury Demand

The Plaintiffs demand a trial by jury on all issues so triable.

RESPECTFULLY SUBMITTED, JOHN PALERMO AND JULIE PALERMO, Plaintiffs,

By their attorney,
Mark J. Favaloro,
BBO# 160330
FAVALORO & ASSOCIATES
348 Park Street,
Suite 202
North Reading MA 01864
(978) 664-1000

Dated: March 21, 2008